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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 JOHN J.,

9 Plaintiff,

Case No. C19-5631 RSM

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

**ORDER REVERSING AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE  
PROCEEDINGS**

13 Plaintiff seeks review of the denial of his applications for Supplemental Security Income  
14 and Disability Insurance Benefits. Plaintiff contends the ALJ erred by rejecting his testimony  
15 and his treating provider's medical opinion and failing to develop the record, and requests  
16 remand for further administrative proceedings. Dkt. 11. As discussed below, the Court  
17 **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further  
18 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

19 **BACKGROUND**

20 Plaintiff is 37 years old, has a high school education, and has worked as a stocker. Dkt.  
21 8, Admin. Record (AR) 18. Plaintiff applied for benefits in October 2016, alleging disability as  
22 of July 1, 2012. AR 58. Plaintiff's applications were denied initially and on reconsideration.  
23 AR 56, 57, 86, 87. The ALJ conducted a hearing in May 2018, in which Plaintiff participated

1 *pro se*. AR 24-55. The ALJ issued a decision in September 2018 finding Plaintiff not disabled.  
2 AR 11-19.

### 3 THE ALJ'S DECISION

4 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

5 **Step one:** Plaintiff has not engaged in substantial gainful activity since the July 2012  
6 alleged onset date.

7 **Step two:** Plaintiff has the following severe impairments: genetic clotting disorder;  
8 history of pulmonary emboli, status-post embolectomy; chronic kidney disease; morbid  
obesity; hypertension; status-post septic arthritis of right knee with arthroscopic irrigation  
and debridement; sleep apnea.

9 **Step three:** These impairments do not meet or equal the requirements of a listed  
10 impairment.<sup>2</sup>

11 **Residual Functional Capacity:** Plaintiff can perform light work except he can never  
12 climb ladders/ropes/scaffolds; occasionally kneel, crouch, crawl, and climb ramps/stairs;  
and frequently balance and stoop. He cannot work at unprotected heights. He can  
occasionally work among mechanical moving parts. He can have occasional exposure to  
cold, heat, wetness, humidity, dusts, fumes, odors, and pulmonary irritants.

13 **Step four:** Plaintiff cannot perform past relevant work.

14 **Step five:** As there are jobs that exist in significant numbers in the national economy that  
15 Plaintiff can perform, he is not disabled.

16 AR 13-19. The Appeals Council denied Plaintiff's request for review, making the ALJ's  
17 decision the Commissioner's final decision. AR 1-3.

### 18 DISCUSSION

19 This Court may set aside the Commissioner's denial of Social Security benefits only if  
20 the ALJ's decision is based on legal error or not supported by substantial evidence in the record  
21 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

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23 <sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

1     **A.     Jeanne Boudrieau, ARNP**

2             In May 2018 Plaintiff’s treating provider, Ms. Boudrieau, opined Plaintiff was unable to  
3 work due to recurrent pulmonary embolism “requiring lifelong placement of ‘Greenfield filter’ in  
4 the descending Aorta, intended to catch clots”; recurrent deep vein thrombophlebitis; chronic  
5 anti-coagulation “requiring frequent office clinic visits to adjust Warfarin dosing”; congestive  
6 heart failure; chronic kidney disease; malignant hypertension; diabetes; morbid exogenous  
7 obesity; chronic knee pain; and polypharmacy (“on multiple medications to manage diagnoses”).  
8 AR 2698. Ms. Boudrieau described Plaintiff’s health status as “fragile,” and opined he had the  
9 capacity for daily living activities only if “punctuat[ed] with frequent rest periods.” *Id.*

10            An ALJ may reject the opinion of a non-acceptable medical source, such as a nurse  
11 practitioner in this case, by giving reasons germane to the opinion.<sup>3</sup> *Ghanim v. Colvin*, 763 F.3d  
12 1154, 1161 (9th Cir. 2014). An ALJ must consider all opinions, including those from non-  
13 acceptable medical sources, which may in some cases even outweigh the opinions of acceptable  
14 medical sources. *See* 20 C.F.R. §§ 404.1527(f), 416.927(f). The ALJ gave Ms. Boudrieau’s  
15 opinions “little weight” as inconsistent with Plaintiff’s activities and with his improvement in  
16 2016. AR 17.

17            **1.     Activities**

18            The ALJ cited Plaintiff’s activities of helping dress and cook for his mother, and walking  
19 slowly for up to two hours at a time. AR 17. Plaintiff testified that his mother has some  
20 disabilities and he helps with dressing her by “getting stuff,” but his father is the one to lift his  
21 mother if needed. AR 40. Getting items to dress his mother does not contradict Ms. Boudrieau’s

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23 <sup>3</sup> Plaintiff’s suggestion that the ALJ was required to provide “clear and convincing” or “specific and  
legitimate” reasons is unsupported. Dkt. 11 at 4. Plaintiff cites *Ryan v. Comm’r of Soc. Sec.*, which only  
involved acceptable medical sources. 528 F.3d 1194, 1199-1202 (9th Cir. 2008).

1 opinions. Plaintiff “[h]elps cook for” his mother. AR 40. In his 2016 Function Report, Plaintiff  
2 stated he spends about five minutes making sandwiches or frozen dinners. AR 211. Ms.  
3 Boudrieau opined Plaintiff could engage in daily living activities with frequent rest periods, and  
4 the ALJ identifies no evidence that Plaintiff’s cooking exceeds the opined limitations.

5 One treatment record, a month after October 2016 surgery for pulmonary embolectomy,  
6 states Plaintiff was “getting more active again and has been walking slowly for up to 2 hours at a  
7 time with his sister on level ground.” AR 2680. But by March 2017 Plaintiff was “not getting  
8 regular exercise.” AR 2688. At the 2018 hearing Plaintiff testified that “walk[ing] a long period  
9 of time is rough these days.” AR 43. That Plaintiff was able to walk slowly with assistance for  
10 up to two hours during at most a four-month period does not undermine Ms. Boudrieau’s opinion  
11 of “inability to ... maintain gainful employment,” working unassisted for eight hours per day.  
12 AR 2698.

13 Plaintiff’s activities were not a germane reason to discount Ms. Boudrieau’s opinions.

## 14 **2. Improvement with Treatment**

15 The ALJ discounted Ms. Boudrieau’s opinions because Plaintiff’s “impairments  
16 improved, including breathing, following treatment in 2016.” AR 17. Elsewhere in the opinion,  
17 the ALJ found Plaintiff’s “impairments did improve with treatment between March 2016 and  
18 November 2016.” AR 17. This finding is contradicted by the ALJ’s own description of serious  
19 and life-threatening medical issues throughout that period due to blood clots in Plaintiff’s heart  
20 and lungs as well as kidney failure.

21 [I]n March 2016, the claimant developed septic shock requiring pressors and  
22 intubation with a complex course for 3 weeks associated with acute renal failure  
23 and dialysis, gastrointestinal bleeding, and a septic right knee. An  
echocardiogram showed a large right atrial thrombus. During convalescence, he  
apparently developed pulmonary infarction with pneumonia. He presented in

1 September 2016 with recurrent embolic disease and 2-week history of progressive  
2 shortness of breath, chest pain, and ankle edema, as well as, orthopnea [and]  
under[went] an embolectomy....

3 AR 16 (citations omitted). Upon discharge his breathing was “quite good,” but any improvement  
4 was short-lived. AR 2671. In October 2016 Plaintiff presented with shortness of breath, leading  
5 to an echocardiogram showing “a large pericardial effusion,” which was treated by  
6 pericardiocentesis removing over a liter of “bloody fluid” from around his heart. AR 2671; AR  
7 16. In November 2016 Plaintiff’s breathing was “markedly improved after his operation.” AR  
8 2680. But again any improvement was short-lived as by March 2017 Plaintiff was experiencing  
9 “increased exertional dyspnea.” AR 2688. There are no treatment notes later than March 2017  
10 in the record. *See* Dkt. 8 at 2-4 (Court Transcript Index).

11 The ALJ’s finding that Plaintiff’s impairments improved in 2016 was not supported by  
12 substantial evidence. It could not, therefore, be a germane reason to discount Ms. Boudrieau’s  
13 opinions. Even if going from renal failure in March 2016 to fluid around the heart in October  
14 2016 can be considered improvement, experiencing “some improvement does not mean that the  
15 person’s impairments no longer seriously affect her ability to function in a workplace.” *Holohan*  
16 *v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001). It is difficult to read the ALJ’s description of  
17 Plaintiff’s medical issues in 2016 and imagine that Plaintiff’s impairments did not seriously  
18 affect his ability to function in a workplace.

19 The Commissioner argues the ALJ permissibly discounted Ms. Boudrieau’s opinions  
20 because she herself “observed in December 2016 that Plaintiff looked ‘really improved,’ was  
21 more animated, and had more energy.” Dkt. 12 at 4 (citing AR 2602). This misrepresents the  
22 record. In January 2017 Ms. Boudrieau wrote Plaintiff’s “affect [is] more animated today, he  
23 looks really improved.” AR 2602. Observations of Plaintiff’s affect have no relevance to Ms.

1 Boudrieau's opinions of physical limitations. Ms. Boudrieau also wrote "More energy and his  
2 walk, ambulatory without assist." AR 2602. Plaintiff's ability to walk without assistance does  
3 not contradict Ms. Boudrieau's opinions.

4 The ALJ erred by discounting Ms. Boudrieau's opinions without a germane reason.

## 5 **B. Plaintiff's Testimony**

6 In a November 2016 Function Report, Plaintiff stated he had problems with breathing,  
7 walking, and lifting. AR 209. He could not stand for long periods of time and did not go out  
8 alone because he was "weak [and] unstable." AR 212. He took short walks daily. AR 212. He  
9 could walk half a block before needing to rest for two minutes. AR 214. Plaintiff testified at the  
10 May 2018 hearing that another reason he could not work was having to take time off for doctors'  
11 appointments. AR 43.

12 Where, as here, an ALJ determines a claimant has presented objective medical evidence  
13 establishing underlying impairments that could cause the symptoms alleged, and there is no  
14 affirmative evidence of malingering, the ALJ can only discount the claimant's testimony as to  
15 symptom severity by providing "specific, clear, and convincing" reasons supported by  
16 substantial evidence. *Trevizo*, 871 F.3d at 678. The ALJ discounted Plaintiff's testimony as  
17 inconsistent with medical evidence and his activities.

### 18 **1. Medical Evidence**

19 An ALJ may reject a claimant's subjective symptom testimony when it is contradicted by  
20 the medical evidence. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th  
21 Cir. 2008).

22 The ALJ relied on treatment records stating Plaintiff was "feeling well." AR 15 (citing,  
23 *e.g.*, AR 1827, 1789). However, "doing well for the purposes of a treatment program has no

1 necessary relation to a claimant's ability to work or to her work-related functional capacity.'"   
2 *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) (quoting *Hutsell v. Massanari*, 259 F.3d   
3 707, 712 (8th Cir. 2001)). In appointments where Plaintiff reported generally "feeling well," he   
4 also had phlebitis, swelling of extremities, or muscle pain. AR 1789, 1827. Plaintiff should not   
5 be penalized for a positive attitude. Moreover, in this context, where Plaintiff's treating provider   
6 told him he must remain "absolutely compliant with his medications if he wants to survive,"   
7 merely surviving is doing well. AR 1723. On this record, feeling well does not contradict   
8 Plaintiff's testimony.

9 The ALJ also cited treatment records showing Plaintiff had a normal gait, even when he   
10 reported leg pain. AR 15 (citing, *e.g.*, AR 1791). A normal gait across a doctor's office does not   
11 show that Plaintiff can stand or walk for over six hours per day, as required by light work.

12 Contradiction with the medical record was not a clear and convincing reason to discount   
13 Plaintiff's testimony.

## 14 **2. Activities**

15 An ALJ may discount a claimant's testimony based on daily activities that either   
16 contradict her testimony or that meet the threshold for transferable work skills. *Orn v. Astrue*,   
17 495 F.3d 625, 639 (9th Cir. 2007).

18 Plaintiff lives with his parents and helps with some household chores when needed. AR   
19 42. For example, he washes his dish after a meal. *Id.* Plaintiff does not sweep, mop, vacuum, or   
20 do yard work. *Id.* Plaintiff's mother has some disabilities and he helps with dressing her by   
21 "getting stuff," but his father is the one to lift his mother if needed. AR 40. Plaintiff helps cook   
22 for her. *Id.* None of these activities contradict Plaintiff's testimony or show he can work full   
23 time.

1 In April 2014 Plaintiff reported he exercises 3-5 times per week for 30-45 minutes on  
2 average. AR 1788. Specifically, he “[t]ries to walk and keep active.” *Id.* In November 2016  
3 Plaintiff reported exercising five times per week. AR 2680. The only type of exercise ever  
4 mentioned in the record is walking. Walking does not contradict Plaintiff’s testimony or show  
5 he can work full time.

6 In October 2014 Plaintiff reported he went shrimp fishing and forgot to bring his  
7 medication. AR 1763. The record does not show that while shrimp fishing Plaintiff’s activities  
8 contradicted his testimony.

9 At the hearing Plaintiff testified that he tries to stay active. AR 45. When the ALJ asked  
10 what Plaintiff meant by “staying active,” Plaintiff replied, “Just doing stuff, not bedridden, not  
11 laying down all the time, sitting up interacting with people.” *Id.*

12 Plaintiff’s activities were not a clear and convincing reason to discount his testimony.

13 The ALJ erred by discounting Plaintiff’s testimony without a clear and convincing  
14 reason.

### 15 **C. ALJ’s Duty to Develop the Record**

16 Plaintiff contends the ALJ failed to discharge his duty to develop the record by  
17 requesting, or advising Plaintiff of his right to request, updated medical records and by advising  
18 Plaintiff of his right to request reopening of a prior claim denied in 2013. Dkt. 11 at 14-15.

#### 19 **1. Additional Medical Records**

20 The ALJ’s duty to “‘fully and fairly develop the record and to assure that the claimant’s  
21 interests are considered’” is particularly important “where, as here, the claimant was not  
22 represented by counsel.” *Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th Cir. 2006) (quoting  
23 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). “An ALJ’s duty to develop the record



1 further is triggered only when there is ambiguous evidence or when the record is inadequate to  
2 allow for proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459–60 (9th  
3 Cir. 2001).

4 The ALJ concluded Plaintiff was not disabled from the July 2012 onset date through the  
5 September 10, 2018, date of the decision. AR 19. The treatment notes in the record ended  
6 March 2017, however. AR 22-23. Aside from Ms. Boudrieau’s May 2018 opinion, there are no  
7 medical records from March 2017 to September 2018. Yet Plaintiff testified at the May 2018  
8 hearing that he continued to receive ongoing care for the same impairments. AR 44 (first  
9 weekly, now monthly, appointments necessary), 46-47. Having rejected Ms. Boudrieau’s  
10 opinion, the ALJ had insufficient evidence to inform his disability evaluation after March 2017.

11 The Commissioner contends Plaintiff testified that “there was no additional evidence.”  
12 Dkt. 12 at 8. At the hearing, after Plaintiff handed the ALJ Ms. Boudrieau’s opinion letter, the  
13 ALJ asked, “Is there anything else?” and Plaintiff responded, “No.” AR 35. This was not a  
14 representation that no relevant evidence existed, but that Plaintiff did not have any other records  
15 to hand to the ALJ. Even if Plaintiff had testified that all of his medical records were already in  
16 the record, his testimony that he was receiving ongoing care created the type of ambiguity that  
17 triggers an ALJ’s duty to develop the record further.

18 On remand, the ALJ should ensure all pertinent medical records are included in the  
19 record.

## 20 **2. Reopening Closed Claim**

21 Plaintiff contends the ALJ erred by failing to advise him of the right to request reopening  
22 of his prior application, which was denied on initial review on April 10, 2013. Dkt. 11 at 14.  
23 The Commissioner asserts any error is harmless because “[i]n that prior application, Plaintiff

1 alleged the same onset date.” Dkt. 12 at 8.

2 The ALJ did not mention Plaintiff’s prior application, but analyzed Plaintiff’s claim as if  
3 Plaintiff was eligible to receive benefits as of the July 2012 alleged onset date. *See* AR 13-19.  
4 “[W]hen an ALJ later considers ‘on the merits’ whether the claimant was disabled during an  
5 already-adjudicated period ... [the] ALJ *de facto* reopens the prior adjudication....” *Lewis v.*  
6 *Apfel*, 236 F.3d 503, 510 (9th Cir. 2001) (citing *Lester v. Chater*, 81 F.3d 821, 827 n. 3 (9th Cir.  
7 1995)). Plaintiff’s prior application was thus reopened.

### 8 CONCLUSION

9 For the foregoing reasons, the Commissioner’s final decision is REVERSED and this  
10 case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. §  
11 405(g).

12 On remand, the ALJ should obtain relevant medical records, reconsider Plaintiff’s  
13 testimony and Ms. Boudrieau’s opinions, reevaluate the RFC as needed, and proceed to step five  
14 as appropriate.

15 DATED this 3 day of February 2020.

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17 RICARDO S. MARTINEZ  
18 CHIEF UNITED STATES DISTRICT JUDGE  
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